No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT E. HANNEGAN, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

READ MAGAZINE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 49) is reported at 63 F. Supp. 318. The majority and dissenting opinions in the Court of Appeals (R. 59, 63) are reported in 158 F. 2d 542.

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1946 (R. 68). The petition for a writ of certiorari was filed on March 7, 1947 (R. 142), and was granted April 28, 1947

(R. 139). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the determination by the Postmaster General that respondents were engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises is unsupportable on the basis of the undisputed facts and the inferences which the Postmaster General might reasonably draw therefrom.

STATUTES INVOLVED

The statutes involved, R. S. §§ 3929 and 4041, are set forth in the Appendix, *infra*, pp. 45–47.

STATEMENT

"Facts," magazine is published, along with Read Magazine, by Read Magazine, Inc., a subsidiary of Publishers Service Company, a publishing company which, in addition to its publishing activities, has been engaged in conducting contests for newspapers, publications, and other customers since about 1928 (R. 35; R. 1, 70, 86, Tr. 133).[1] The officers of the parent and subsidiary

[1] "Tr." references are to the unprinted Transcript of the Proceedings before the Solicitor for the Post Office Department, which is a part of the record on file with the Court (R. 46). Only a portion of this transcript is contained in the printed record, but the parties have stipulated that they may refer to unprinted portions (R. 142).

corporation are approximately the same (R. 35; R. 70, Tr. 87–88). Since 1941, Publishers Service has largely confined its contest promotional efforts to those contests which were sponsored by itself directly or through its subsidiaries (R. 35, Tr. 100–102).

Under date of June 26, 1945, the Solicitor of the Post Office Department transmitted to respondents a memorandum of charges alleging that "Facts" magazine, Henry Walsh Lee, as editor-in-chief, and Judith S. Johnson, contest editor, were engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses and representations that the contest was one in which the prizes would be awarded for the correct solutions of puzzles; that there was a probability that the contestant would become a prize winner merely by the submission of correct solutions to the first 80 puzzles; and that the only fees to be paid by a contestant were those submitted with the first series of puzzles (R. 21–22, 33). On September 4 and 5, 1945, a hearing was had upon the charges which had been preferred (R. 34). The Solicitor of the Post Office Department made findings of fact and recommendations that a "fraud order" should issue, and submitted them to the Postmaster General (R. 33–43), who approved them and issued an order barring the named respondents from receiving letters and other matter and postal

money orders pursuant to 39 U. S. C. § 259, 732 (R. 22–23).

The respondents here, Read Magazine, Inc., the corporation which publishes "Facts" magazine, Literary Classics, Inc. (a subsidiary corporation publishing books), Publishers Service Company (the top holding company), and Henry Walsh Lee and Judith S. Johnson, instituted this suit to enjoin the enforcement of the fraud order (R. 1–12). Both parties filed motions for summary judgment (R. 46–47). The district court granted the respondents' motion and issued an injunction (R. 57–58). The Court of Appeals for the District of Columbia affirmed, Mr. Justice Edgerton dissenting, holding the Postmaster General's finding upon the facts to be unsupported and arbitrary and capricious (R. 59–68).

The facts which may be considered in determining whether the Postmaster General's order is adequately supported appear in the record before him, which is incorporated in the present record.[2]

[2] The record in this case also contains affidavits submitted in support of and in opposition to the motion for summary judgment (R. 47, 23, 48; 46, 43, 31). But whether the Postmaster General's decision is supported by evidence is obviously to be determined solely on the basis of the record before him and respondents are not entitled to introduce in court evidence *de novo* on this issue. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227; *Tagg Brothers and Moorhead* v. *United States*, 280 U. S. 420. In any event, the affidavit evidence does not alter the picture in any material way.

SUMMARY OF THE EVIDENCE

This case involves the "Hall of Fame Puzzle Contest" conducted by "Facts" magazine. This contest was admittedly patterned (R. 71–72, 86–87) closely upon an earlier contest conducted by respondents, the "All-American Puzzle Contest", as well as on other similar contests (R. 38, 70–71, Tr. 102), and it is necessary to start with that contest in order to understand the respondents' scheme.

The "All-American Puzzle Contest".—The All-American Puzzle Contest was conducted by respondents in 1942–1943 with a series of prizes to be awarded to the successful contestants (R. 35, 71). The contest presented 120 rebus puzzles[3] divided into series of six each. For each series which contestants submitted, they were required to pay 15 cents. Rule 6 of the All-American contest provided that in the event that two or more persons tied, "then the first two or more prizes would be reserved" and the prizes subsequently awarded to the winner of a first, and if necessary a second tie-breaking group of puzzles, divided in series exactly like the first. The second group of tie-breaking puzzles was to be accompanied by a letter of 200 words on the subject "My Choice for American Hero No. 1." Only in cases of ultimate

[3] A rebus puzzle consists of a series of pictures of objects to be identified. By addition and subtraction of letters in the names identifying the objects, the solution of the puzzle is obtained (See Ex. opp. R. 36).

ties were the letters to be judged and the prizes awarded on the basis of the letters. (Ex. 2, opp. R. 87.) Upon the conclusion of the contest, each contestant who had completed a full group of puzzles received a book (Ex. 2, opp. R. 87).

352,000 people entered the contest, 132,000 submitted answers to all 120 puzzles and over 95,000 submitted correct solutions (R. 74). Of the 95,000 participants in the first tie-breaking set of puzzles, 77,000 solved all the puzzles correctly and participated in the second run-off. Of these, 55,000 correctly solved all puzzles and had their letters judged, and prizes were awarded on the basis thereof (R. 74).

Although the rules accurately described the tie-breaking procedures, the original letters and other literature referred to the contest only as a puzzle contest (Ex. 2–E, F, R. 87, 88). Letters written to the 95,000 contestants who had tied originally and who had tied in the first group of tie-breakers were clearly designed to create the impression that there was a possibility that the prizes might be awarded on the basis of a solution of the puzzles alone. Thus the letters to those who became eligible for the first tie-breaking contest stated (Exhibit 2–F, R. 88):

> In receiving congratulations you will be interested in knowing that more than one-half of those who started in the contest lost out or dropped out by the eighth week, and that more than 24,000 contestants from

> that point on lost out either by submitting one or more incorrect solutions or by dropping out of the contest entirely. The puzzles which proved most difficult were Nos. 17, 41, 60, 66, and 71, although practically all of the 120 puzzles were incorrectly named by many contestants during the course of the contest.

The announcement of the first tie-breaking puzzles sent out at the same time stated (Exhibit 2–F–1, opp. R. 89; see also 2–G–1, opp. R. 91):

> Do not be discouraged if you fail to solve one or more of these puzzles, for remember, they are intended to be tie-breaking puzzles. There is always the possibility that somebody else may miss the same puzzle or more puzzles than you missed. *You can still win the higher prize if you have the higher total score, no matter how many puzzles you may have missed.* [Italics supplied.]

And the announcement which introduced the second tie-breaking group of puzzles stated (Exhibit 2–G–1, opp. R. 91): "This letter * * * will be taken into consideration ONLY in case ties still exist AFTER solutions to the final tie-breaking group of puzzles have been checked" (capitals in original).

In another letter it was stated that although the number tied would not be announced, the contestants would be informed of the "exact number of puzzles correctly solved by each winning con-

testant" (Exhibit 2-K-3, R. 95). All of these statements suggest that there was a reasonable chance that it would be unnecessary to resort to essays and that the winners might be determined on the basis of puzzles alone.

The contestants were required to pay an additional $3.00 for entering each tie-breaking series (R. 75). In addition, when the solutions to the second run-off contest had been submitted, respondents urged contestants to pay additional entry fees of $7.50 in order to be eligible for double prize winnings (R. 75). 44,000 out of 77,000 did so (R. 79).

Inasmuch as persons who believed—correctly—that they could solve the easy puzzles might not have remained in the contest and paid additional fees if they had known in advance that it was certain that they would have to compete in essay writing with many thousands of others, respondents' motive in implying that possibly essays would be unnecessary is obvious. The amount of prize money distributed in the contest was about $40,000 (R. 78). The total cost to the sponsors was approximately $1,250,000 and the total receipts approximately $1,450,000 (Tr. 168).

The "Hall of Fame Puzzle Contest".—The "Hall of Fame Puzzle Contest" was conducted in substantially the same manner as the "All-American Contest". The contest was extensively advertised as a puzzle contest and nothing else (R. 36; Exhibits opp. R. 36, 87). As appears from the ex-

hibits, the word "Puzzle" was emphasized in large letters and frequently. Some of the advertisements did not mention any possibility of ties or of letter writing but referred generally to the rules. (Ex. 1-B, opp. R. 87.) In other advertisements the rules themselves were printed, but nowhere else was there reference to anything but the original 80 puzzles (Exhibits opp. R. 36). The contest was to consist of 80 rebus puzzles divided into 20 series of 4 puzzles each. To qualify for a prize, it was required that fifteen cents be enclosed with the solutions for each of the 20 series of puzzles, or $3.00 altogether, in return for which each contestant was to receive an unidentified book "issued by the Literary Classics Book Club", a subsidiary of Read Magazine (Ex. 1, opp. R. 36).[4]

The puzzles differed from those in the "All-American", and earlier contests (R. 91) in that at the top of each puzzle was a descriptive guide line such as: "Represents the name of the inventor of the phonograph and electric light", with the answer showing spaces for a six-letter word (Puzzle No. 1); "Represents the name of a Republican President who became Chief Justice of the Supreme Court" (four letter word) (Puzzle No. 2); "Represents the name of a British king whose court is the setting of a book by Mark

[4] It was testified that the books are printed, bound and illustrated in a manner which makes them more attractive and costly than the ordinary current best seller (Tr. 181); they cost respondents 65 cents to 85 cents each (Tr. 166-177).

Twain" (six letter word) (Puzzle No. 3); "She was created from a man's rib" (three letter word) (Puzzle No. 64).[5] Ex. pp. 1, 3, opp. R. 36).

The advertising announced "500 Cash Prizes", ten ranging downwards from $10,000 to $100; 90 were of $10.00 and 400 were of $5.00 (Ex. opp. R. 36). The advertising did not state what respondents knew would be the fact, that $9.00 in entrance

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[5] In connection with these guide-lines Miss Fertel, Secretary-Treasurer of the respondent corporations and in charge of the details of the contest, was asked:

Tr. 188:

"Q. Will you tell me why they put the descriptive language at the top of each puzzle, as for example a Biblical name on puzzle number 48, series 12?

"A. Yes, sir. The captions were put at the tops of the puzzles in order to make the contest of more general interest because the contest is called a 'Hall of Fame' contest, and also in order to prove indubitably that there is only one possible solution to the puzzle."

Tr. 193:

"Q. Whose idea was it to put these descriptive phrases at the top of the rebus puzzles?

"A. We all decided that it would add more interest and intrigue and stimulation mentally to the puzzles to put the captions over them."

Tr. 190:

"Q. In puzzle No. 64 to which Mr. Mindel referred, the caption says 'She was created from a man's rib.' And at the bottom of the figures are three spaces for letters. Didn't you intend that to inform the contestant as to the answer to that puzzle?

"A. We did not intend to inform the contestant as to the answer of the puzzle. We intended it to identify absolutely who the name was that was represented in the puzzle.

"Q. For whose benefit?

"A. For everybody's benefit so that there could be no possible question as to the name represented by that puzzle."

fees would be necessary to qualify even for a $5.00 prize (R. 40, 75, 113).

The rules of the contest, which were included in some of the advertisements and which were sent to the contestants contained the following provisions (Ex. opp. R. 36):

> 8. To qualify for a prize, the contestant is required to accompany each Series of four solutions with 15 cents in coin. Each contestant who submits a complete Group of solutions for this contest qualified in accordance with the Rules will receive the book selected for the month of July by the Literary Classics Book Club. Any contestant who becomes eligible to submit, and who does submit, a Group of qualified tie-breaking solutions, will receive the following months Book Club selection. Entrants who for any reason drop out of the contest before sending in the complete Group of 80 solutions will receive a set of Quotations by Famous Statesmen.
>
> 9. Neatness will not count. Do not decorate your answers. Just submit your solutions in accordance with the rules. *In case of* ties, *if two or more persons tie* in submitting the correct solutions, then the first two or more prizes will be reserved for those contestants and will be awarded in the order of accuracy of the submissions of those contestants to a first, *and if necessary,* a second, tie-breaking group of puzzles, divided into Series exactly like the first Group. *In case a second tie-breaking*

Group of puzzles is necessary, contestants eligible to solve same will be required to accompany their solutions to this second tie-breaking Group of puzzles with a letter of not more than 200 words on the subject: "The Puzzle I found Most Interesting and Educational in This Contest." All tie-breaking Series must be qualified in accordance with the provisions of Rule No. 8. Only *in case* ties exist after such final tie-breaking puzzles have been checked will the letters be considered, and *in that event* they will be judged on the basis of originality in description and general interest. *In case of* final ties, duplicate prizes will be awarded. Upon entering the contest, the entrant is asked to realize that the sponsor anticipates that a large number of persons *may* enter the contest and that a large number *may* solve one, two or all three of the Groups of puzzles, and that the sponsors will not make known the number of persons competing in any phase of the contest, irrespective of how large or how small that number may be. FACTS Magazine reserves the right to offer contestants the opportunity to win increased prizes, or to offer consolation prizes or additional prizes at any time prior to the conclusion of the contest. [Italics supplied.]

Numerous letters sent to contestants during the first portion of the contest continued to speak of it exclusively as a puzzle contest containing "80 puzzles", without further mention of ties or

letters (Ex. 3, 4, 5, 6, 8, 9, R. 96–101, 110–112). A "mimeographed set of standard replies for the answering of questions asked by contestants" (Ex. 7, R. 101) clearly was designed to give the impression that there was a possibility that the contest might be completed without the necessity of more than 80 puzzles, saying (Ex. 7–B, R. 103):

> Q. If I solve all 80 puzzles correctly, will I get a prize?
>
> A. If you are the only person in the contest to correctly solve all 80 of the puzzles, then and in that event you will automatically be entitled to the first prize. However, if other persons also correctly solve 80 puzzles and thereby become tied with you, then the procedure as to the breaking of ties and the determination of winners follow the provisions as set forth in Rule No. 9 of the Official Rules to which you are referred now.

Approximately 190,000 contestants initially entered the contest, and 90,000 completed the first series (R. 37, 3–4). Of these 90,000, more than 35,000 submitted correct solutions, with the result that no prizes were awarded (*Ibid.*; Tr. 155).

Letters were sent to the successful contestants notifying them that they were eligible for the first tie-breaking group of puzzles, (Ex. 10–C; R. 113–114), and notifying all the losers that they could participate in a consolation contest con-

sisting of the tie-breaking puzzles, in which they were offered the same amount of prize money (Ex. 12–A, B, D; R. 134–139).[6] Exhibit 10 (C) (R. 114) advised contestants that "we feel sure you will be interested in knowing that many thousands of persons who competed against you either missed one or more of the puzzles or dropped out of the contest entirely. Among the puzzles which contestants found the more difficult were numbers 39, 40, 59, 63."

These letters were also designed to induce contestants to pay larger sums in return for a chance to double the prize. Respondents sent to tied contestants letters dated July 5, 1945 and July 6, 1945 (Ex. 10–D and 10–E, R. 115–118, respectively; cf. Ex. 11–A and 11–B unprinted), stating in the first letter (R. 115) that "you will be delighted to know that we are going to pay DOUBLE[7] the amount of the prizes originally offered in this contest as provided in the Eligibility Form which you will receive," and enclosing with the second letter (R. 116) a "Prize Eligibility Form" which permitted contestants, by subscribing for more books, the names of which were not given, to win double prizes. Although it was stated in the letters that "your eligibility to com-

[6] Respondents' complaint alleges that approximately 26,000 persons entered the consolation contest, and that approximately 12,250 solved all puzzles correctly and were eligible for further tie breaking puzzles (R. 5).

[7] Capitals in original, though not as reprinted in the Record by the Government Printing Office.

pete for the original prizes remains, regardless of whether you do or do not qualify for eligibility to compete for the higher prizes," (R. 115–116, 117) the letters were so worded that many contestants would be led to believe that such subscriptions were necessary in order to remain eligible to compete in the contest. (R. 39.) The letter of July 5, 1945, stated in the first paragraph (Ex. 10–D, R. 115):

> Under separate cover I am sending you a Form for Specifying Prize Eligibility. This form should be filled in and returned to us within 5 days after receipt by you if possible, and sooner if you can do so. It *must* become a part of your file in the contest. [Italics supplied.]

The first three paragraphs of the letter of July 6, 1945, stated as follows (Ex. 10–E, R. 116):

> You will find enclosed herewith the Prize Eligibility Form mentioned in my previous letter.
>
> This Prize Eligibility Form requires your signature in two places to enable you to become eligible to compete for as much as $20,000 or $15,000 as First Prize in accordance with the terms of the double prize offer, and in addition, provides the necessary spaces for signifying acceptance of the terms of the offer.
>
> This Form and any extensions applying to same *must* become a part of your file in the contest, and we will thank you to fill

in same and mail to us within five days after receipt by you if possible, or earlier if you can do so. [Italics supplied.]

To become eligible to compete for a first prize of $20,000, a payment of $12 for four books was necessary, and for a first prize of $15,000, a payment of $6 for two books was required (R. 39; Ex. 11–C, R. 130–132).

Of the approximately 35,000 who participated in the tie-breaker contest, 27,000 successfully solved all of the puzzles and were thus still tied for first place (R. 38, 41–42; Tr. 171, 155). They thereby became eligible to compete in a second tie-breaking contest, to complete which would necessitate the payment of another $3.00 (R. 41, 75). With this second tie-breaker series of puzzles, the contestants were to submit a letter on the subject "The Puzzle I Found Most Interesting and Educational in This Contest," but which letter was to be considered "only *in case* ties exist" (R. 41).

The successful contestants were advised that they could become eligible for quadruple prize money by payment of $24 for 8 months' subscription to the "Book Club" (R. 40; Ex. 10–G, H, I, J, K, R. 119–130). The procedure followed by respondents in their solicitations in connection with the double prize offer was substantially followed with respect to the quadruple prize device, except that instead of two letters being sent out contestants were barraged with a series of four

letters, on August 15, 16, 17, and 18, 1945 (*ibid.*; Ex. 11–F, R. 133, 11–I, K (unprinted). By purchasing a total of 8 books from respondents for $24 a contestant became eligible to compete for a $40,000 first prize (R. 40, 125–126). He could also become eligible to compete for an increased first prize, but of a lesser amount than $40,000, by purchasing a smaller number of books (*Ibid.*). These letters forwarding and discussing what was this time called the "Appendage for your Prize Eligibility" were worded as the earlier letters had been, in a manner that might lead contestants to believe they had to buy books to remain eligible for contest, since they were told (R. 130) that "the Appendage *must* become part of your file in the contest, and must be mailed back to us, postmarked before Midnight, Saturday, August 25th" [Italics supplied]. One of these letters for the first time indicated that a great many persons actually were tied (Ex. 10–G, R. 120). The contest was interrupted by the Post Office Department before the last tie-breaking group of puzzles could be sent out.

Since 1941 respondents have conducted a series of rebus puzzle contests of which the "Hall of Fame Contest" was the fourth. All were of a similar pattern (R. 38, Tr. 102).[8] Respondent

[8] Mr. Arter, president of respondent corporation, testified (Tr. 102):

"Q. And do you know that during your absence on war duty there were conducted this series of puzzle contests commencing with 'Music Appreciation' and then, as I under-

admitted that none of the puzzle contests conducted since 1941 have been decided on the basis of the solution of puzzles, but, on the contrary, in all of them, letters or essays have been written and considered and the prizes accordingly have been awarded on the basis of the best letters or essays (R. 38, 86–87). A contract was made in advance of the instant contest calling for a price of 10½ cents per letter for judging each of the tie-breaking letters, if any (Tr. 157).

The receipts for the contest at the time it was interrupted amounted to $767,441.90. Prizes to be paid amounted to $105,000, and the cost of books to be distributed $194,756.19. Other expenses brought the total cost, as calculated by one of respondents' officers, to $936,843.71 (Tr. 165–166),[9] which included $90,000 for salaries for re-

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stand it, followed by 'All-American', then followed by 'Read' and then followed by the current one; is that correct?

"A. That is right, sir.

"Q. All of them conducted for the benefit of the company or its subsidiaries?

"A. That is right.

"Q. And all of them in that time, all four of them, is it your understanding that all four of them followed a similar pattern?

"A. That is right."

[9] Miss Fertel testified (Tr. 165–166):

"The prizes total $105,000.00; the books $194,756.19; the puzzles and puzzle booklets $24,374.42; the advertising $120,240.95; printing and stationery $30,835.60; the filing and judging of puzzle solutions $80,592.27; mailing service $74,800.38; refunds to late entries among contestants $4,560.35; postage $113,641.63; freight, automobile and trucking $8,575.39; rent $14,330.21; electricity, telegraph, tele-

spondents' five officers (Tr. 175, 183). Whether there would have been an ultimate deficit or profit, and how much, would have depended on the extent to which the 27,000 remaining contestants subscribed more than the minimum $3.00 for the last tie-breaking group of puzzles in order to obtain multiple prize money.

On the basis of these facts the Postmaster General found *inter alia,* (R. 38–39):

> Throughout the contestant's participation in this so-called "puzzle contest" up to this stage thereof, the fiction is maintained that the prizes may be won by those who correctly solve all of the simple rebus puzzles sent them by the promoters. However, the evidence in this case shows that beginning with the year 1941 (since which time all of the puzzle contests conducted by the Publishers Service Company have been solely for the benefit of that company and its subsidiaries) none of the rebus contests promoted by Mr. Sarazen and his associates have been won by the solution of the puzzles alone. Prior to that time contests were operated by this firm only as promotional schemes for other interests. The Music Appreciation, All American, and

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phone, insurance, and bank charges $8,067.52; payroll and payroll taxes $114,603.98; general office expense, accounting, and auditing $18,028.19; supplies and packaging $2,405.21; art work, photostats, and copyrights $5,174.77; addressing and special correspondence $3,626.63; miscellaneous expense $8,076.70; detective services in guarding mail deliveries and opening mail $5,153.32. That makes a total of $936,843.71."

Read contests, which also were presented to the public as rebus puzzle contests, were finally decided not upon the basis of correct solutions to the puzzles by one person or by a number of persons submitting a lesser number of correct solutions than the first prize winner. All of said contests, which Mr. Sarazen testified were similar in pattern to the one here involved, were finally decided upon the basis of the best letter or essay written by the ultimately successful contestant. It was freely admitted at the hearing in this case that respondents anticipated and, in fact, planned that the current so-called "Hall of Fame Puzzle Contest" will similarly be decided upon the basis of the best letter written and not upon the basis of the correct solutions of the puzzles. It is therefore apparent from the evidence in this case, and I so find, that respondents knowingly and falsely represented to persons solicited to participate in the "Hall of Fame Puzzle Contest" that they could and would win the prizes offered by submitting the most correct solutions to the "All 80 Puzzles" and later to the tie-breaking puzzles, whereas, in truth and in fact, as they well knew, such representations were untrue and this contest can only be won by solving all the puzzles and, in addition, writing what will finally be adjudged the best letter on the subject "The Puzzle I Found Most Interesting and Educational in This Contest." In other words, the con-

test is one in which the winners will be those who are the best letter writers.

The fact that the contest might be decided by a best letter is mentioned in the official rules only as a remote contingency, whereas, in truth, it was an inevitable certainty from the very beginning of the contest, as the respondents well knew.

(R. 40):

> The participant enters the contest upon the basis of representations and rules which lead to the belief that he will have to pay only a total of $3.00 for the privilege of solving "all 80 puzzles." However, as the contest continues through its succeeding stages he is called upon by the promoters for ever-increasing remittances, amounting at this stage of the enterprise to as much as $42.00. If he resists the demands or invitations to pay the additional sums necessary to qualify him for the double and quadruple prizes, he will nevertheless be compelled to remit a total of $9.00 in order to remain in the contest up to and through the final stages, a fact which is not revealed to the participants at the outset.

SUMMARY OF ARGUMENT

Even without express misrepresentations, statements which are so designed, by the suppression of a known fact, as to produce a false impression upon the minds of others and to mislead them are fraudulent. Whether particular advertising has such an effect presents an issue of fact upon

which the administrative determination is to be accepted if it has a rational basis.

The basic misrepresentations, upon which all the formal charges and findings rest, lay in the fact that respondents knew for a certainty that thousands of contestants would solve all the original 80 puzzles, and both groups of tie-breakers, and therefore knew that the contest would run through three groups of puzzles into a letter writing contest in which thousands of qualifiers would be eligible. The contestants, on the other hand, though informed (if they read the rules carefully enough) that there was a chance that the contest would run through two tie-breaking sets of puzzles and a judging of the letters, were led to believe that this was only a possibility, not a substantial certainty, and that the contest also might be completed on the basis of the first or second group of puzzles without the necessity for a third. The concealment by respondents of their *knowledge* that the contest would run through to its letter writing conclusion caused persons to enter the contest who would otherwise not have done so, both because (1) persons who would enter a puzzle contest despite the possibility of tie-breaking essays might not enter a contest which they knew would consist of three qualifying rounds of simple puzzles, and then a final round of competitive letter writing for which thousands of the original competitors would remain eligible, and (2) persons would be less likely to enter a contest

which they knew would cost $9.00 than one which might cost only $3.00. Indeed, the rules did not make it clear to the contestants that more than the original $3.00 would be required in the event of ties.

ARGUMENT

THERE WAS A REASONABLE BASIS IN THE EVIDENCE FOR THE POSTMASTER GENERAL'S CONCLUSION THAT RESPONDENTS' SCHEME WAS DECEPTIVE

Section 3929 of the Revised Statutes provides that the "Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters * * * to return all * * * letters * * * with the word 'Fraudulent' plainly written or stamped upon the outside thereof."[10]

A. LEGAL PRINCIPLES

This case involves two principles of law and their application to the facts heretofore summarized.

1. *Suppression of a material fact is fraud.*—The first, in the language of the Court of Appeals for the District of Columbia itself in an earlier mail

[10] The constitutionality of the Act was specifically upheld by this Court in *Public Clearing House* v. *Coyne*, 194 U. S. 497.

fraud case (*Farley* v. *Simmons*, 99 F. 2d 343, 346, certiorari denied 305 U. S. 651) which was expressly reaffirmed in the instant case (R. 61), is "that even if an advertisement is so worded as not to make an express misrepresentation, nevertheless, if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable".

This is in conformance with the general principle long recognized in actions for fraud or deceit that "the gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, at 388. The "suppression of a material fact, which [the party] was bound in good faith to disclose, was equivalent to a false representation". *Tyler* v. *Savage*, 143 U. S. 79, 98. In *Equitable Life Insurance Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, 425–426, this Court approved the "generally accepted doctrine" adopted in the Restatement of Torts, § 529, that " 'a statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation'. Such a statement of a half

truth is as much a misrepresentation as if the facts stated were untrue."

2. *Scope of review of administrative factual inferences.*—Whether material facts were concealed, whether the advertising gave those to whom it was addressed a false impression, present questions of fact. And this leads to the second legal principle of significance in this case—that on such matters of fact the finding of the Postmaster General will not be disturbed by the courts "where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary. *Bates and Guild Co.* v. *Payne,* 194 U. S. 106, 108, 109; *Smith* v. *Hitchcock,* 226 U. S. 53, 58; *Houston* v. *St. Louis Independent Packing Co.,* 249 U. S. 479, 484; *Milwaukee Social Democratic Publishing Co.* v. *Burlesen,* 255 U. S. 407, 413, and cases cited." *Leach* v. *Carlile,* 258 U. S. 138, 140. This principle has frequently been recognized by the Court of Appeals for the District of Columbia as applicable to fraud orders issued by the Postmaster General.[11]

The court below did not doubt that this doctrine—the general rule as to the scope of judicial review of administrative action—was controlling. But in our opinion, it disregarded the many cases

[11] *Farley* v. *Heininger,* 105 F. 2d 79, 81–82 (App. D. C.), certiorari denied, 308 U. S. 587; *Farley* v. *Simmons,* 99 F. 2d 343, 347–348 (App. D. C.), certiorari denied, 305 U. S. 651, *National Conference on Legalizing Lotteries* v. *Farley,* 96 F. 2d 861 (App. D. C.), certiorari denied, 305 U. S. 624.

holding that under the rule "the inferences from the evidence are to be drawn by the [administrative agency] and not by the courts". *Medo Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 681–682n; *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 739; *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U. S. 746, 760; *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 60; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 107; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 307; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63.

In the instant case there is no dispute as to what representations respondents made, or as to what the facts are. Whether the representations left readers with a false impression and whether they were intended by respondent to do so are matters of factual inference. On such questions the administrative determination is to be accepted if there is a "rational basis" for the administrative conclusion. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

Since the above principles are both indisputable and undisputed, the question in this case is whether there was a reasonable basis for the Postmaster General's inference of fact that respondents' scheme was designed to create a false impression.

B. THE BASIC ISSUE: CONCEALMENT OF THE CERTAINTY OF TIES

The court below, in our view, mistakenly held that there was no misrepresentation because, despite Mr. Justice Edgerton's clarifying dissent,[12] it misunderstood the nature of the deception respondents were practicing.

The basic misrepresentations, upon which all the formal charges and findings rest, lay in the fact that respondents knew for a certainty that

[12] "The puzzles were simple. Appellees knew from experience with similar contests that thousands of contestants would solve all the puzzles correctly; that it was impossible to win a prize merely by solving puzzles; and that prize winners would be chosen from among thousands of persons on the basis of a letter-writing contest. So much is plain and undisputed.

"It follows that if appellees intended to convey to all or any of their readers either (1) the idea that the contest was merely a puzzle contest or (2) the idea that there was a substantial chance that prizes would be won merely by solving puzzles, appellees made a false pretense. The fraud order must be sustained if the Postmaster General could reasonably find either of those intents. Either is plainly material, since a person who is willing to risk his money in a puzzle contest may be unwilling to risk it in a letter-writing contest and a person who is willing to face a possibility that puzzles may not be decisive may be unwilling to face a certainty that they will not be decisive." (R. 63–64.)

thousands of contestants would solve all the original 80 puzzles, and both groups of tie-breakers, and therefore knew that the contest would run through three groups of puzzles into a letter writing contest in which thousands of qualifiers would be eligible. The contestants, on the other hand, though informed (if they read the rules carefully enough) that there was a chance that the contest would run through two tie-breaking sets of puzzles and a judging of the letters, were led to believe that this was only a possibility, not a substantial certainty, and that the contest also might be completed on the basis of the first or second group of puzzles without the necessity for a third. The concealment by respondents of their *knowledge* that the contest would run through to its letter writing conclusion was of significance in at least two important respects.

1. Many persons who would enter a puzzle contest even against thousands of competitiors would be much less disposed to enter a contest which they knew from the beginning would consist both of a qualifying series of puzzles and a final round of essays or letters for which thousands of the original contestants would remain eligible. Many persons who would have confidence in their ability to solve such puzzles as were illustrated in respondents' advertising would not feel that they possessed the competence in literary composition essential for successful participation in a large scale essay contest. Such persons would enter

a puzzle contest despite what they would regard as a possibility that letters might be required to break a tie. They might not enter a contest in which they knew for a certainty that a tremendous number of persons would solve all the puzzles and be eligible to compete with them in letter writing. This was a fact which respondent knew but failed to disclose.[13]

2. The second aspect of the deception is that prospective contestants would be much less likely to enter a contest which they knew would ultimately cost $9.00 than one costing $3.00, even taking into account that for each $3.00 a contestant would receive a book.[14]

Even if it be assumed, contrary to the Postmaster General's finding (discussed *infra*, pp.

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[13] The Postmaster General found *inter alia* that respondents were misrepresenting the contest as one in which prizes would be awarded "for the correct solution of puzzles" (R. 35, 43). This finding was proper, since respondents knew that prizes would in fact be awarded only to persons who solved all the puzzles and who "in addition" (R. 38) wrote superior letters. The concealment of a material portion of the facts is as deceptive as an affirmative misstatement. See pp. 24–25, *supra*. There is no basis for respondents' suggestion that this finding means that the Postmaster General thought that respondents' advertising would have been accurate if it had characterized the contest as only a letter writing contest. See the finding, R. 38. Nevertheless, inasmuch as thousands of contestants were certain to solve all the puzzles correctly, the real competition was in the letter writing, and respondents knew that the prizes would in fact be awarded on the basis of a judging of the letters.

[14] A reasonable man could conclude from respondents' advertising that the lure for the contest was to be the prize money rather than the unidentified literary classics.

40–44), that the advertisements and the rules made it clear to the contestants that an additional $3.00 must be paid with each tie-breaking group of puzzles, contestants would still be led to believe that the contest might end with the first 80 puzzles and that there was only a possibility, not a certainty, that the contest would run through two tie-breaking groups each requiring the payment of an additional fee. Persons who would enter a contest which they thought might cost only $3.00 might not enter a contest which they knew would cost $9.00, particularly when 90 of the 500 prizes offered amount to $10.00 and 400 to only $5.00. Even apart from the letter writing requirement and the multiple prizes and fees, respondents knew from their experience that no contestant could win any prize without the payment of $9.00 in fees.

For the above reasons, respondents' representations would be fraudulent if respondents knew that the contestant would run through three groups of 80 puzzles and cost $9.00, and be resolved by the judging of thousands of letters, but deliberately gave contestants the impression that these were only possible contingencies. By deliberately failing to state the whole truth in order to give an erroneous impression, respondents' activity was "as much a misrepresentation as if the facts stated were untrue". *Equitable Life Insurance Co.* v. *Halsey, Stuart & Co.*, 312 U. S. at 425–426, *supra*, p. 25.

It is necessary only to refer briefly to the evidence summarized in the Statement to show that there was adequate support for the Postmaster General's finding as to these factors.

C. EVIDENCE AS TO RESPONDENTS' KNOWLEDGE THAT THE CONTEST WOULD CULMINATE IN A JUDGING OF LETTERS

This was the fourth rebus puzzle contest conducted by respondent since 1941. In each of the other three the prizes had been awarded on the basis of letters submitted by those who were tied in working the puzzles (R. 86–87). In the one of these contests for which the figures appear in the record, the "All-American Contest", 55,000 persons correctly solved three sets of rebus puzzles and were eligible for the letter writing finale. See p. 6, *supra*. Respondents' officers admitted that the "Hall of Fame Contest" was patterned on the "All-American Contest" (R. 71–75); and in fact the "Hall of Fame Contest" was conducted in substantially the same manner as the "All-American Contest". The rules, the letters of solicitation, the scheme for double prizes in return for additional fees, were in substance indistinguishable. The fact that 27,000 out of 35,000 entrants correctly solved all the first group of tie-breaking puzzles, almost the same percentage as among the "All-American" first tie-breakers,[18]

[18] 77,000 out of 95,000, or 81% solved the first tie-breakers in the "All-American Contest" (R. 74). The percentage in the "Hall of Fame Contest" was 77.

indicates that the puzzles were of comparable difficulty. The use of the guide lines in the "Hall of Fame Contest" also strongly suggests that respondents were not seeking to make the puzzles too difficult. See pp. 9–10.

Furthermore, it is clear that respondents had a strong financial motive not only to have the contest extend at least through all three tie-breaking puzzles but to have as many contestants as possible participate right through to the end.[16] As the Postmaster General found (R. 42) "the greater the number of 'ties' the more profitable this so-called 'puzzle contest' is to its promoters."[17] For respondents received at least $3.00 (minus approximately 65¢ to cover the cost of a book) from each contestant for each tie-breaking series. And respondents sought substantially to increase the fees paid through a carefully planned advertising campaign to induce contestants in the tie-breaking contests to pay in additional sums up to a total of $45.00[18] in order to obtain multiple prizes. In the

[16] Even apart from the letter writing, contestants would be deceived if respondents knew from the beginning that the contest would run through all tie-breaking puzzles at additional cost to contestants while the latter were given the impression that there was only a possibility that the contest would go beyond the original 80 puzzles and $3.00 fee.

[17] The smaller number of entries apparently prevented this contest from being as profitable as the "All-American Contest" (Cf. R. 74, 3).

[18] $3.00 for each of the three groups of puzzles, $12.00 additional for the second, $24 additional for the third (R. 37–40).

"All-American Contest" 44,000 out of the final 77,000 were persuaded to pay extra fees (R. 79), and respondents had good reason to believe that the same tactics would be as fruitful in the contest here in issue.

The motive of respondents to devise a contest in which a great number of persons would participate through all the tie-breaking series is thus clear. And this Court, speaking through Chief Justice Hughes, has wisely observed that "Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose." *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, at 559.

D. EVIDENCE AS TO RESPONDENTS CONCEALING FROM CONTESTANTS THE KNOWLEDGE THAT THE CONTEST WOULD CULMINATE IN THE JUDGING OF LETTERS

Respondents could, of course, have informed prospective contestants of that which respondents knew to be the fact, that the contest would cost $9.00 and consist of three qualifying rounds of simple rebus puzzles plus a final round of letter writing for the many persons who would inevitably solve all the puzzles. Whether many persons—or as many—would have entered such a contest may be doubted. Respondents themselves apparently had no confidence in the drawing power of such an honest disclosure. For their advertising was carefully calculated not to misstate facts

but nevertheless to give readers an erroneous impression.

Except in the rules themselves, the original advertising and literature did not refer to ties, additional puzzles, additional expenditures, or letter writing. The emphasis—in large letters—was on PUZZLES. See Exhibits opp. R, 36, 87. Some of the advertisements did not contain the rules (Ex. 1–B, opp. R. 87), and in others the location of the rules, and particularly of the provision relating to tie-breaking and letter writing, was quite inconspicuous (Ex. 1, opp. R. 36). Mr. Justice Edgerton, dissenting below, was of the view that in setting that provision "in fine print, near the bottom of the page, in a paragraph introduced by matter both unrelated and unimportant, what can have been their purpose, except to prevent as many prospective contestants as possible from finding out that the contest might involve letter writing?" (R. 66).[19]

But if we assume that prospective contestants read the rules, they were still given the impression—or the Postmaster General could reasonably so find—that the contest might be completed with the first 80 puzzles or within the first two tie-breaking series of puzzles. A person examining the rules would learn that the contest *might* end

[19] On this point the dissenting opinion states more fully (R. 65–66):

"The writing of letters is nowhere mentioned in type that is large or heavy or prominently placed. It is mentioned

in a letter-writing competition for which many persons *might* be eligible. But, in Mr. Justice Edgerton's language, a prospective contestant "would not learn that thousands of persons were certain to be eligible, or even that any letter-writing contest at all was certain to be required.

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only in the Rules. The Rules are in fine print, twelve lines to an inch, in the lower left-hand corner of the page. They contain almost a thousand words divided into ten numbered paragraphs. The quotation on which the court relies, beginning with the words 'In case of ties * * *' and ending with the words '* * * the conclusion of the contest,' is a part of paragraph 9 of the Rules. That paragraph is the longest of the ten and therefore the least likely to be read in its entirety. It does not begin with the language which the court quotes. It begins with these words: 'Neatness will not count. Do not decorate your answers. Just submit your solutions in accordance with the rules.' Nothing could be better calculated to suggest to a prospective contestant (a) that the remainder of the paragraph, like its opening sentences, is unimportant and need not be read, and (b) that the remainder of the paragraph, like its opening sentences, deals only with 'answers' and 'solutions.' Then follows, beginning in the middle of a line of fine print, with nothing to emphasize it or draw the reader's attention to it, the language which the court quotes and on which the court relies. It would have been easy for appellees to print this language in large type, or in heavy type, or to begin a paragraph with it, or to devote an entire paragraph to it, or to do several of those things. From any point of view but one and for any purpose but one, the importance of this language clearly demanded that attention be called to it in some way, since it was the only language in the entire advertisement which tended to qualify the numerous and conspicuous assertion of the headlines, the large type, the pictures, and the entry form that the contest was a puzzle contest. Instead of emphasizing this vital language, appellees did the opposite. They hid it as effectively as they could. * * *"

Nothing of that sort is stated anywhere, not even by the hidden language on which the court relies. On the contrary, that very language intimates, clearly and repeatedly, that ties in the solving of puzzles may or may not occur and that although the prizes may not, on the other hand they may, be won by the solving of puzzles alone: '*In case* of ties, *if* two or more persons tie in submitting the correct solutions'; '*if necessary*, a second tie-breaking group of puzzles'; '*In case* a second tie-breaking group of puzzles is necessary'; '*Only in case* ties exist after such final tie-breaking puzzles have been checked will the letters be considered'; 'the sponsor *anticipates* that a large number of persons *may* enter the contest and that a large number *may* solve, one, two or all three of the Groups of puzzles.' [Italics supplied.]" (R. 66).

In further reply to the suggestion of the majority below that the next to the last sentence of paragraph 9 gave contestants adequate notice, Mr. Justice Edgerton stated "The court says that prospective contestants were 'told in the Rules that the sponsors anticipated that a "large number" of persons would solve all the puzzles.' I cannot find this statement in the Rules. In other words I do not agree with the court that 'may' means 'will.'" (R. 66–67).

The repeated use of such qualifying phrases as "in case of ties" clearly was designed to suggest that ties were not certain to occur.

And these conditional expressions were placed in a setting in which the original puzzles alone were mentioned and stressed over and over again. Read in this background a contestant would not understand that the contest was certain to run through three groups of puzzles costing $3.00 each and to culminate in a large scale competition in writing letters.

After the contest started, respondents continued to foster this mistaken impression by sending contestants a number of letters referring to the contest exclusively as a puzzle contest, *supra*, p. 13. In addition, respondents informed contestants that "*if* you are the only person in the contest to correctly solve all 80 of the puzzles * * * you will automatically be entitled to the first prize" (R. 103, see p. 13, *supra*). This statement was followed by a caveat "that *if* other persons correctly solve 80 puzzles" there would be resort to the tie-breaking procedure; but it nevertheless clearly implies that possibly only one contestant might solve the first 80 puzzles correctly.

The court below found it "impossible to believe that any prospective contestant would think that only one person would be successful in the solutions" (R. 62). Nevertheless, the possibility of this was the impression which respondents sought to convey. As Mr. Justice Edgerton stated in his dissent (R. 67), "Many readers lacked the knowledge, based on experience with similar contests, which appellees had and this court now

has. * * * To say that it [the court's finding] invalidates the fraud order is equivalent to saying that if a scheme would not deceive reasonable men, to whom it is not primarily addressed, it may legally be used to take money from children and other simple people. The advertisement is primarily addressed to such people, since they are the ones likely to be attracted by crude and easy puzzles." In rejecting a similar contention this Court said in *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116 "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." See also *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516, 530; *Bailey* v. *Smith*, 23 F. 2d 977, 979 (App. D. C.). "When the parties do not have equal means of knowledge, it is immaterial that the victim, if more suspicious, could have discovered the cheat." *Falter* v. *United States*, 23 F. 2d 420, 424 (C. C. A. 2). "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. 73, 75 (C. C. A. 2).

The Postmaster General's conclusion that readers would be deceived as to the true nature of the contest—and that respondents so in-

tended—thus has ample support in the evidence. With Mr. Justice Edgerton we think not only that the inference of fraud was reasonable, but that it was the only possible inference that can reasonably be drawn.

E. THE NECESSITY OF PAYING ADDITIONAL FEES FOR TIE-BREAKER PUZZLES

We have pointed out how contestants were deceived as to the actual cost of the contest in that their ignorance of the fact, known to respondents, that prizes could not be awarded until all three tie-breaking groups of puzzles had been solved, led them to believe that the contest might cost $3.00 instead of $9.00. Such a mistaken impression would occur even if it be assumed that contestants knew that an extra $3.00 was required for each tie-breaking series—since they would not be aware that the two tie-breaking series were inevitable. But this assumption, in respondents' favor, is unwarranted.

Concerning the payments to be required, the booklet containing "All 80 puzzles" distributed by respondents states (p. 3): "Enclose 15 cents In Coin With Each Series of Solutions". The advertisement in *Newsday of* April 3, 1945, stated (Ex. opp. R. 36): "Enclose 15¢ With Each Series," and then added in small type: "To qualify your solutions for a prize, as provided under the Rules, enclose 15 cents in coin with each Series of four puzzle solutions. Coins should be wrapped care-

fully in a small piece of paper. In return for the remittances for the twenty Series, you will receive the book issued by the Literary Classics Book Club as per the Rules." The advertisements would thus lead one to believe that the contest would cost 15 cents for 20 series, or $3.00. Nor does a reading of the "Official Rules Of The Contest" (*ibid.*) change this impression.

Rule 4 opens with the statement that "The 80 puzzles are divided into 20 Series of 4 puzzles each." After setting forth a number of other matters, the Rule concludes with the statement that "All Series must be qualified in accordance with Rule No. 8." Rule 8, quoted in full, *supra*, (p. 11), states:

> 8. To qualify for a prize, the contestant is required to accompany each Series of of four solutions with 15 cents in coin. Each contestant who submits a complete Group of solutions for this contest qualified in accordance with the Rules will receive the book selected for the month of July by the Literary Classics Book Club. Any contestant who becomes eligible to submit, and who does submit, a Group of qualified tie-breaking solutions, will receive the following months Book Club selection. * * *

The only other reference in the rules to the charges for the contest is buried in the middle of Rule 9, by far the longest and most involved of the 10 rules, where it is stated that "All tie-

breaking Series must be qualified in accordance with the provisions of Rule No. 8." This statement, even if a prospective contestant should reasonably be expected to have found it in the rules and to have studied it in detail, still would not cause him to believe that he would have to pay sums in excess of $3.00.

For if he should scrutinize Rule 8 with great care he would find that the first sentence refers to a contestant qualifying, and the second sentence to each contestant submitting a complete group of solutions qualified in accordance with the rules receiving the "book selected for the month of July". This would imply that a contestant would become qualified if he sent in the first group of 80 puzzles with the requisite sum of $3.00, inasmuch as the rules require these puzzles to be submitted not later than June 16, 1945. A contestant might reasonably believe that if he qualified "for a prize in accordance with the Rules" in completing the first group of puzzles that would enable him to compete in any tie-breakers necessary before prizes could be awarded.

Respondents argue that, if rules 8 and 9 are read together, they require the payment of 15¢ with each series of four solutions in the tie-breaking puzzles as well as in the original 80. A lawyer reading the rules as meticulously as he would a will or a deed would see that they could be so construed—although not that they must be.

But respondents were not appealing to the type of mind trained in the refinements of the interpretation of documents. It would have been simple enough for respondent to have made a clear and frank statement of the cost of the contest, a matter of obvious importance to contestants. But, as the memorandum for the Postmaster General stated (R. 40–41):

> the rules which respondents claim contain this information are obscurely and ambiguously phrased. They are plainly calculated to conceal the true facts, which might discourage any potential contestant from entering the contest. It is apparent that respondents' contest promotional experiences have demonstrated the financial advantages of using such obscurely worded rules. To plainly state the proposition to persons solicited to enter the contest would limit entrants to those who were convinced of their superior essay-writing abilities, whereas, the lure in the present case is to persons who, finding the "ALL 80 PUZZLES" so obviously simple of solution, believe themselves entirely capable of winning the $10,000 prize merely by submitting such correct solutions and paying the small sum of $3.00 in weekly remittances of 15 cents each. Even those who most scrupulously study the so-called "Official Rules" and consider their content in connection with the other representations printed in juxtaposition thereto could not divine the facts which are well known to the promoters but

not to the contestant; namely that participation costs more than $3.00; that so-called "tie-breakers" are inevitable, and that the contest can be won only by the person writing the best letter upon the subject "The Puzzle I Found Most Interesting and Educational in This Contest," with respect to which it is stated that "*only in case ties exist* after such final tie-breaking puzzles have been checked will the letters be considered * * *." [Italics supplied.]

Even if it be thought that the above conclusion is debatable, it certainly was not unreasonable, or irrational, for the Postmaster General to reach such a result.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded to the District Court with directions to dismiss the complaint.

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OCTOBER 1947.

APPENDIX

R. S. § 3929 (39 U. S. C. 259), as amended by the Act of September 19, 1890, c. 908, § 2, 26 Stat. 465, 466, provides as follows:

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to him-

self. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

R. S. § 3929 was further amended by the Act of March 2, 1895, c. 191, § 4, 28 Stat. 963, 964, to cover not only registered letters but all letters or other matter sent by mail:

SEC. 4. That the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matter sent by mail.

R. S. § 4041 (39 U. S. C. 732), as amended by the Act of September 19, 1890, c. 908, § 3, 26 Stat. 465, 466, provides as follows:

SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or

promises, forbid the payment by any postmaster to said person or company of any postal money-orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way.

U. S. GOVERNMENT PRINTING OFFICE, 1909